Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

LEON WASZAK,

Petitioner,

v.

PASADENA CITY COLLEGE, etc., et al.,

Respondents.

Petition For Writ Of Certiorari
To The California Court Of Appeal
Second Appellate District
Division Three

PETITION FOR WRIT OF CERTIORARI

ROHDE & VICTOROFF
STEPHEN F. ROHDE, Esq.
1880 Century Park East, Ste. 411
Los Angeles, California 90067
(310) 277-1482

Attorneys for Petitioner
Leon Waszak

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the California Court of Appeal applied the wrong legal standard under the Civil Rights Act of 1991, in affirming the trial court's denial of any attorneys fees or costs whatsoever to Leon Waszak, as a matter of law, following a jury verdict in his favor which found that Pasadena City College had engaged in an "unlawful employment practice."

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PETITION FOR WRIT OF CERTIORARI

Leon Waszak ("Waszak") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, Division Three entered in this proceeding on June 28, 1996. The Supreme Court of California denied Waszak's Petition for Review on September 18, 1996.

OPINIONS BELOW

The opinion of the California Court of Appeal that gives rise to this Petition is unpublished and is reprinted in the Appendix hereto ("App. 1"). The Order of the California Supreme Court dated September 18, 1996 appears at App. 13.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(a).

Pursuant to Supreme Court Rule 13.1, this Petition has been filed within ninety (90) days of the denial of the Petition for Review.

STATUTES INVOLVED IN THIS CASE

Title VII, 42 U.S.C. § 2000e-2(m) provides that

> "Except as otherwise provided in this subchapter, an unlawful employment practice is

> established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated that practice."

Title VII, 42 U.S.C. § 2000e-5(g)(2)(B) further contains the following specific fee-shifting provision:

> "On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –
>
> (i) may grant . . . attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under ¶ 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment described in subparagraph (A)."

STATEMENT OF THE CASE

It is important that this Court grant review of the decision of the California Court of Appeal in order to settle an important question of federal law regarding employment discrimination. Today, few issues demand such serious judicial attention as the enforcement of laws against employment discrimination on the basis of gender, race or ethnicity. Given the limited resources available to governmental agencies to adequately pursue

administrative and legal remedies, Congress has encouraged the use of private civil rights litigation through the incentive of awards of reasonable attorney's fees and costs. A Title VII plaintiff, like Waszak, is the "chosen instrument of Congress to vindicate a policy that Congress considered of the highest priority." *Christiansburg Garment Co. v. E.E.O.C.*, 98 S. Ct. 694, 698 (1978).

By applying the incorrect legal standard in this case, the Court of Appeal has seriously discouraged private enforcement of anti-discrimination laws. While paying lip-service to the Civil Rights Act of 1991, the Court of Appeal proceeded to apply a legal standard which Congress had specifically eliminated. To compound its error, the Court ignored the express finding of the jury that Pasadena City College ("the College") had engaged in an "unlawful employment practice." And finally, the Court imprudently chastised Waszak for having the temerity to even file his civil rights action in the first place because it forced "the college president and dean and faculty to explain their hiring decision under oath . . . " (App. 11).

From 1988 to 1991 Waszak had been an instructor in history at the College's Department of Social Sciences. He had been teaching since 1978, after receiving his B.A. and Master's degrees in history from Cal State Los Angeles and his Ph.D. from the University of Southern California.

In October 1990, the College announced the opening of a tenure track teaching position in American History and European Civilization. Waszak made a timely application and on December 4, 1990 he was notified that he had been selected for an interview for the position. Waszak was not selected for the position. On May 20,

1992 Waszak commenced this action and on September 18, 1992 he filed an Amended Complaint alleging that the College had violated the California Fair Employment and Housing Act ("FEHA"), Government Code § 12900 *et seq.* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 *et seq.*

The case went to trial and on July 27, 1994 the jury returned a special verdict finding that Waszak's race was a motivating factor in the College's decision not to hire him, but that the College would have made the same decision even if the unlawful motive was not present. Accordingly, the jury awarded no compensatory damages.

On August 5, 1994, Waszak filed a Motion to Fix Attorney's Fees and Costs, supported by the Declaration of William S. Harris, his trial counsel. The Motion asserted that based upon the jury's special verdict, under the *express* terms of Title VII's special fee-shifting provision, 42 U.S.C. § 2000e-5(a)(2)(B), Waszak qualified for an award of reasonable attorney's fees and costs in the amount of $56,597.25, notwithstanding the fact that the jury had not awarded any compensatory damages.

The Motion was heard on August 26, 1994. Ignoring the special provisions of Section 2000e-5(a)(2)(B), the trial court found that Waszak was not the "prevailing party" because he had not received an award of compensatory

damages.[1] Therefore, the trial court concluded, as a matter of law, that Waszak was not entitled to *any* award of attorney's fees and costs. The trial court did not find that any "special circumstances" existed which would justify the denial of attorney's fees and costs nor that the amount of attorney's fees and costs sought by Waszak was unreasonable. The trial court awarded costs to the College in the amount of $2,866.94. Judgment was entered on Special Verdict August 26, 1994.

Waszak filed a timely Notice of Appeal on October 20, 1994. The College did not appeal from that portion of

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[1] The oral ruling by the trial judge reveals that he incorrectly applied the "prevailing party" standard and misapprehended that in a "mixed motive" case such as this, the fact that "other factors" were present did *not* disqualify WASZAK from recovering attorney's fees and costs under Section 2000e-5(g)(2)(B).

> "I think the cases hinge on whether or not Waszak was the prevailing party. The most recent cases appear to indicate that there must be established that the plaintiff was the prevailing party, and I don't find that in this case.
>
> The thrust of this case was that Waszak was suing for damages based on discrimination. Whether or not – and this very form that was prepared by plaintiff clearly said that it was "more likely than not a motivating factor," and the answer to that was "yes." But that was not the reason – that was not the reason why Waszak was not hired. There were other factors that were considered that apparently preponderated over the alleged discrimination.
>
> Based on that, I don't find that Waszak was the prevailing party in this case. Your request for attorney's fees will be denied."

the Judgment incorporating the jury's Special Verdict which found that Waszak's race was, more likely than not, a motivating factor in the College's decision not to hire him. The Court of Appeal filed its decision on June 28, 1996. The California Supreme Court denied Waszak's Petition for Review on September 18, 1996.

REASONS FOR GRANTING THE WRIT

I. WASZAK IS ENTITLED TO RECOVER HIS REASONABLE ATTORNEY'S FEES AND COSTS UNDER THE SPECIAL FEE-SHIFTING PROVISIONS OF TITLE VII.

At trial, Waszak proved that the College had engaged in racial discrimination in violation of state and Federal civil rights statutes. The jury found that the College committed an "unlawful employment practice" by discriminating against Waszak on the basis of his race. As a consequence, he was authorized to recover his "attorney's fees and costs" under 42 U.S.C. § 2000e-5(g)(2)(B).

The special Title VII attorney's fees statute is unusual and quite unlike other statutory attorney's fees provisions. Nowhere does it use the familiar phrase "prevailing party." Instead, it creates its own statutory scheme tailor-made to the purposes and policies of Title VII itself. Where an individual proves to the jury's satisfaction that he or she has been the victim of an unlawful employment practice due to gender or racial discrimination, but the defendant proves to the jury's satisfaction that it would have taken the same action in the absence of the impermissible motivating factor, Congress nevertheless sided

with the victim and authorized an award of reasonable attorney's fees and costs.

The Civil Rights Act of 1991 represented a response to a need for expanded remedies under Title VII and made compensatory and punitive damages available to victims of intentional employment discrimination. See 42 U.S.C § 1981a; H.R.Rept. No. 102-40(II), 102nd Cong., 1st Sess., at 24-30 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 694, 717-22. 42 U.S.C. § 2000e-2(m) applies to so-called "mixed-motive" or "same-decision" cases. This provision was designed to overturn this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed.2d 268 (1989) which had held that, even where an employer relies in part on an impermissible motive in making an employment decision, it would not be liable for violating Title VII if it could prove that it would have made the same decision in the absence of the prohibited motivation.

Congress modified that outcome. The 1991 Act provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m). In other words, an employer has violated Title VII if *any* of the prohibited criteria played *any* role at all in the disputed employment decision. However, if legitimate factors also motivated the decision and the employer can demonstrate that the same decision would have been made even if it had not relied on the impermissible motivating factor, the relief that the plaintiff may recover for the Title VII violation is very limited. The

plaintiff may *not* recover backpay, compensatory damages or punitive damages, and the court may *not* issue any order requiring any admission, reinstatement, hiring, promotion, or payment. The only remedies available are declaratory relief, limited types of injunctive relief, and *attorney's fees and costs*. 42 U.S.C. § 2000e-5(g)(2)(B)(i).

The College's reliance on this Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566 (1992), was misplaced. The *Farrar* decision interpreted a *different* attorney's fee statute, 42 U.S.C. § 1988. In a traditional civil rights case under 42 U.S.C. § 1988, where a plaintiff technically prevails at trial but recovers no damages, the court would generally *deny* recovery of attorney's fees and that is what *Farrar* stands for.

Once the correct statute is applied to the instant case, the result is manifest. Regardless of whether Waszak is the "prevailing party" under *other* attorney's fees statutes, he qualified for an award of reasonable attorney's fees and costs since he fit precisely within the requirements of 42 U.S.C. § 2000e-5(g)(2)(B).

II. THE DECISION OF THE COURT OF APPEAL APPLIED THE WRONG LEGAL STANDARD AND IGNORED THE JURY'S VERDICT THAT RESPONDENT HAD ENGAGED IN EMPLOYMENT DISCRIMINATION.

The decision of the Court of Appeal began by reciting correct principles of law but proceeded to totally ignore them in affirming the trial court's ruling.

The Court of Appeal accurately stated that the jury, by an 11-1 vote, "found that [Waszak's] race was a

motivating factor in the college's decision not to hire him, but that the college would have decided not to hire him even if race had not been a motivating factor" (App. 3). Accordingly, the Court correctly found that "the college had engaged in an unlawful employment practice." (App. 6). The Court then accurately summarized the impact of the Civil Rights Act of 1991 and the availability of attorney's fees and costs in "mixed-motive same-decision" cases under 42 U.S.C. § 2000e-5(g)(2)(B). In a critical passage the Court correctly held that:

> "It is thus clear that the award [of attorney's fees and costs] authorized by section 2000e-5(g)(2)(B) is not contingent on the plaintiff's prevailing, for the statute (§ 2000e-5(g)(2)(A), (B)(2)) prohibits any grant of relief directly benefitting the plaintiff in a mixed-motive same decision case. (See *Hall v. City of Brawley*, (S.D.Cal. 1995) 887 F.Supp. 1333, 1346 fn. 5 [plaintiff need not be a prevailing party within the meaning of *Farrar v. Hobby* to be eligible for a fee award under § 2000e-(5)(g)(2)(B)(1)].)"

(App. 6).

But at this point, the decision radically departed from these well-settled principles and proceeded to misapply the very legal standards it had just so succinctly stated. First, the Court rejected Waszak's contention that the trial court ignored Section 2000e-5(g)(2)(B) and denied him legal fees because he was not the "prevailing party." Although, as in this Petition, Waszak quoted the *entirety* of the trial court's oral decision denying fees and costs *twice* in his Opening Brief, in its decision the Court inaccurately accused Waszak of relying "on a sound bite isolated from the court's spoken ruling on his motion: 'I

don't find that Waszak was the prevailing party in this case. Your request for attorneys' fees will be denied.' " (App. 7).

The trial court's *complete* statement speaks for itself. It began with a critical (and incorrect) introduction:

> "I think the cases hinge on whether or not Waszak was the prevailing party. The most recent cases appear to indicate that there must be established that the plaintiff was the prevailing party, and I don't find that in this case."

This is an incorrect statement of the law in a "mixed-motive same decision case," as the Court of Appeal *itself* accurately noted in the passage quoted above. Indeed, the trial court's reference to the "most recent cases" appears to refer to *Farrar v. Hobby*, which the Court of Appeal acknowledges does *not* apply to Section 2000e-5(g)(2)(B). Remarkably, having correctly stated the applicable law, on the very next page the Court incorrectly stated, *as applied to the present case*, that "the Supreme Court of the United States has ruled that in fixing the amount of attorneys' fees in civil rights cases, a paramount consideration is the result achieved by the plaintiff, and a court can fix even a prevailing party's fees at zero in an appropriate case." (App. 7).

The Court of Appeal compounded its use of an erroneous legal standard, by defending the trial court's analysis of Waszak's entitlement to attorney's fees and costs. Earlier in its decision, the Court of Appeal acknowledged that under *Newman v. Piggie Park Enterprises*, (1968) 390 U.S. 400, absent "special circumstances," there is a presumption in favor of awarding attorney's fees and costs

to a successful plaintiff in a civil rights action (App. 4). But when it came to Waszak, who had succeeded in establishing an "unlawful employment practice," thereby qualifying him for attorney's fees and costs under Section 2000e-5(g)(2)(B), the Court held, *without citation to any authority*, that "the presumption favoring awards to plaintiffs does not operate in a mixed-motive same-decision case." (App. 7-8). In its place, astonishingly, the Court of Appeal turned to *Farrar v. Hobby* (where "we find all the guidance we need to decide the present appeal," (App. 9)), the very case the Court correctly eschewed earlier in its opinion. The Court proceeded to announce a rule directly at odds with its own correct statement of the law and the entire foundation for the Civil Rights Act of 1991:

> "This principle – that a trial court should evaluate the degree of a plaintiff's success when deciding what is a reasonable fee to require the defendant to pay him – should also apply in section 2000e-5(g)(2)(B) cases".

(App. 10)

Having repudiated the correct legal standard, the Court of Appeal did not hesitate to also repudiate the jury's verdict (which is final and unassailable since the College failed to cross appeal). The Court stated that Waszak "failed to establish that he was entitled to any of the relief for which he prayed in his complaint." (App. 10-11). Of course, this statement improperly resurrects the inappropriate "lack of success" test which the Civil Rights Act of 1991 eliminated in mixed-motive same-decision cases, like this one. The Court characterized the "evidence of unlawful discrimination" as "flimsy" (App.

11). But as noted, the jury's finding of employment discrimination is final and the College never argued that it was not supported by substantial evidence.

The Court of Appeal claimed that "[n]one of the jurors found that plaintiff was harmed by discrimination;" that Waszak "attained nothing for himself by this litigation" and that Waszak filed "a groundless lawsuit." (App. 11). Each of these statements is a variation on the discredited "lack of success" test and has no place in an analysis under Section 2000e-5(g)(2)(B). Waszak did *not* file a "groundless lawsuit." He did attain something very significant – the verdict of a jury of his peers that Pasadena City College engaged in an "unlawful employment practice" because it used his race as a motivating factor in its decision not to hire him.

Finally, the Court of Appeal issued two intemperate accusations against Waszak which seriously undermine the rule of law. First, the Court unfairly condemned Waszak for forcing "the college president and dean and faculty to explain their hiring decision under oath, an unwarranted indignity certain to harm higher education by deterring faculty from agreeing to serve on hiring committees." (App. 11). This statement is at odds not only with the jury verdict in this case, but with our entire legal system which is based on the fundamental precept that no one is above the law and that all persons, from the President of the United States to the president of Pasadena City College, must respond to lawful process and be held accountable in a court of law. *United States v. Nixon*, (1974) 418 U.S. 683. At great personal cost and legal expense, Professor Waszak pursued a civil rights complaint through trial and succeeded in securing a jury

verdict vindicating his claim of an "unlawful employment practice." If the College truly suffered any "indignity" by having to "explain" its "hiring decision under oath" it was warranted by the facts and the jury verdict. Given that verdict, Waszak is part of a worthy American tradition of "whistle blowers" who should be encouraged, not condemned.

The second injudicious statement made by the Court was that "a public college should be praised, not fined, for its modest effort to attract and hire some highly qualified faculty members who are not white or who are not male." (App. 11). The jury in this case did *not* find that the College merely made this "modest effort." That was what the College argued, but instead the jury found that the College had engaged in an "unlawful employment practice" by using race as a motivating factor in its decision not to hire Waszak.

The Court of Appeal was on dangerous ground when it imposed its own ideological views contrary to federal statutory law in an attempt to sanitize unlawful conduct. In other times and in other regions of our nation, courts attempted to justify racial discrimination by claiming that women and black Americans were not "qualified" to work or to vote. We rejected those excuses and adopted anti-discrimination laws, which under the constitutional requirements of Equal Protection, should be enforced even-handedly to root out discrimination against *any* race or *either* gender. The precedent set by the Court of Appeal could have ominous consequences in frustrating the efforts of women and minorities to seek redress against discrimination. The same rule of law must apply to a white employee victimized by racial discrimination, as to

a non-white employee. The solemn duty of the Court of Appeal was to enforce the Congressional intent of the Civil Rights Law of 1991 by issuing a legally correct, not politically correct, decision.

The concluding remarks of the Court of Appeal reveal that it seriously lost its way in this case and applied the wrong legal standard, thereby justifying this Court's review.

III. WHERE, AS HERE, NO "SPECIAL CIRCUMSTANCES" EXIST, A SUCCESSFUL PLAINTIFF WHO QUALIFIES UNDER SECTION 2000e-5(g)(2)(B)(i) IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES AND COSTS.

Ignoring the settled law in this area, the Court of Appeal asserted that the trial court's discretion is virtually boundless under Section 2000e-5(g)(2)(B) because it provides that the court "*may* grant . . . attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under § 2000e-2(m) of this title." (emphasis added). But the trial court's discretion is not unfettered. Well-established rules have been developed to promote the Congressional policy encouraging vigorous enforcement of Title VII and expanded remedies for victims of racial discrimination.

Ordinarily, a successful plaintiff in a Title VII case will be awarded attorney's fees unless "special circumstances" render such an award unjust. *Newman v. Piggie Park Enterprises, supra.* When *Newman* was decided, four years after the enactment of the Civil Rights Act of 1964,

only injunctive relief was available. In the absence of money damages, the Supreme Court held that the award of attorney's fees, where no "special circumstances" existed, was important in "vindicating a policy that Congress considered of the highest priority" and "to encourage individuals injured by racial discrimination to seek judicial relief" under the law. 390 U.S. at 402.

The "special circumstances" exception has been narrowly construed. As one commentator has noted: "The presumption in favor of an award of fees to prevailing plaintiffs in private attorney general lawsuits is, in fact, so strong that a denial of fees on the basis of 'special circumstances' is extremely rare." 1 M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 10.02[3], at 10-12 (1988); see also *Borunda v. Richmond*, 885 F.2d 1384, 1392 (9th Cir. 1988); *Connor v. Winter*, 519 F.Supp. 1337, 1348 (S.D.Miss.1981); *Gates v. Collier*, 559 F.2d 241, 244 (5th Cir. 1977) (Coleman, J., concurring) ("I concur in the award of . . . attorney's fees . . . , but I do so only because Congress has seen fit to *require* it") (emphasis added)."

The courts have held that " 'fee awards should be the rule rather than the exception.' " *Ackerley Communications Inc. v. City of Salem*, 752 F.2d 1394, 1396 (9th Cir. 1985), cert. den. 472 U.S. 1028, 105 S. Ct. 3503, (1985), quoting *Teitelbaum v. Sorennson*, 648 F.2d 1248, 1251 (9th Cir. 1981). See also *Herrington v. County of Sonoma*, 883 F.2d 739, 743 (9th Cir. 1989).

Contrary to the approach promoted by the Court of Appeal, a court may not deny a motion for fees solely

because the statute grants it discretion to do so. *Herrington*, 883 F.2d at 744, citing *Sargeant v. Sharp*, 579 F.2d 645, 647 (1st Cir. 1978).

> "Instead, we must articulate reasons for any departure from the general rule that prevailing parties are to be awarded fees, identifying any special circumstances and explaining why they render an award unjust. *Id.*; *Setha v. Alameda County Water Dist.*, 602 F.2d 894, 897 (9th Cir. 1979), cert. denied, 444 U.S. 1046, 100 S. Ct. 734, 62 L.Ed.2d 731 (1980). The defendant has the burden of showing special circumstances warrant a denial of fees, *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985) and the defendant's showing must be a strong one, *J.&J. Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985)." 883 F.2d at 744.

In opposing Waszak's Motion for Attorney's Fees, the College offered no evidence of any "special circumstances" which would overcome the presumption in favor of an award of attorney's fees and costs. Neither the trial court nor the Court of Appeal found any "special circumstances." On this record, since no "special circumstances" were established by the College or articulated by the trial court or the Court of Appeal, Waszak was entitled to an award of reasonable attorney's fees and costs.

The recent decision in *Sheppard v. Riverview Nursing Center, Inc.*, 88 F.3d 1332 (4th Cir. 1996) supports Waszak's position. There, the Court of Appeals remanded the issue of reasonable attorney's fees under Section 2000e-5(g)(2)(B) on the grounds that the district court had been under the misimpression that an award was "mandatory." The Court held that an award was discretionary;

that "lack of success" in obtaining a money judgment does not preclude an award of attorney's fees and that prevailing plaintiffs in mixed-motive cases will often recover fees despite the unavailability of damages. 88 F.3d at 1338-1339. The Court recognized that there will be cases in which special circumstances such as the plaintiff's "unacceptable conduct" i.e., "embezzling funds, divulging company secrets, or acting abusively toward his or her co-workers" will justify the denial of attorney's fees. 88 F.3d at 1336, 1338.

The record in the instant case contained no evidence whatsoever of any "unacceptable misconduct" on Waszak's part. The analysis in *Sheppard* is consistent with Waszak's approach here: the court has discretion under Section 2000e-5(g)(2)(B) and in the absence of special circumstances, a plaintiff who has established an "unlawful employment practice," but recovered no money damages, should receive an award of reasonable attorney's fees.

IV. THE PUBLIC INTEREST IN ERADICATING RACIAL DISCRIMINATION AS REFLECTED IN THE CIVIL RIGHTS ACT OF 1991 SHOULD BE PROMOTED BY AN AWARD OF REASONABLE ATTORNEY'S FEES AND COSTS.

The Court of Appeal claimed that Waszak was not "harmed by discrimination." (App. 11). But whether or not he proved that he was "harmed" is beside the point under Section 2000e-5(g)(2)(B)(i). Failing to prove damages is no longer relevant to the analysis in this type of

case. The Court of Appeal's decision ignores the fundamental principle that as a remedial statute, Title VII "should be liberally construed to advance [its] beneficent purposes." *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1235 (3d Cir. 1994), citing, among others, *Hart v. J.T. Baker Chem. Co.*, 598 F.2d 829, 831 (3d Cir. 1979); see also *Dennis v. Higgins*, 498 U.S. 439, 443, 111 S. Ct. 865, 868 (1991). In enacting the 1991 Act, "Congress forcefully reminded courts of the canon that Title VII and ADEA, as remedial statutes, are to be construed liberally to promote their welfare purposes, equality of treatment and employment opportunities." 31 F.3d at 1235, n.23. Since "anti-discrimination laws are suffused with a public aura for reasons that are well known," Congress responded to the "pernicious misconceptions and ignoble hatreds" which motivate invidious discrimination "with humanitarian laws formulated to wipe out the iniquity of discrimination in employment, not merely to recompense the individuals so harmed but principally to deter future violations." 31 F.3d at 1234.

Therefore, a plaintiff, like Waszak, in an employment-discrimination case "acts not only to vindicate his or her personal interests in being made whole, but also as a 'private attorney general' to enforce the paramount public interest in eradicating invidious discrimination." 31 F.3d at 1234, citing *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602, 101 S. Ct. 817, 824 (1981). In passing the 1991 Act, Congress again recognized "the public interest in eradicating discrimination even when the employer had acted at the time of its decision for a legitimate reason that would have propelled it to take the same actions standing alone." 31 F.3d at 1234, n.22. Even "if the

plaintiff is entitled to no personal relief, at least the remedies inuring to the public's benefit – a declaratory judgment, injunctive relief, and, derivatively, attorneys fees," evidence "a strong public policy in favor of enforcement of the anti-employment discrimination laws." 31 F.3d at 1234, n.22.

Thus, the Court of Appeal's fixation on the fact that Waszak was not "harmed" and did not recover damages, runs counter to the clear Congressional intent behind 42 U.S.C. § 2000e-5(g)(2)(B)(i), namely the public interest in eradicating employment discrimination and encouraging individuals to serve as private attorney generals through the incentive of recovering reasonable attorney's fees and costs. In reversing the Court of Appeal's erroneous ruling, this Court will go a long way to vindicate these important constitutional and public policy interests.

V. CONCLUSION

For each of these reasons, the Petition for Certiorari should be granted.

DATED: December 13, 1996

Respectfully submitted,

ROHDE & VICTOROFF

STEPHEN F. ROHDE

Attorneys for Petitioner
Leon J. Waszak

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LEON J. WASZAK, Plaintiff and Appellant, v. PASADENA CITY COLLEGE, Defendant and Respondent.	)	B088108 (Super. Ct. No. GC007234) (Filed Jun. 28, 1996)

APPEAL from a judgment of the Superior Court of Los Angeles County, George Xanthos, Judge. Affirmed.

Rohde & Victoroff and Stephen F. Rohde for Plaintiff and Appellant.

Liebert, Cassidy & Frierson and Arturo Morales for Defendant and Respondent.

Plaintiff Leon J. Waszak appeals from a judgment, entered August 26, 1994, in his employment discrimination action against respondent Pasadena City College. Plaintiff contends the trial court erred in denying his application for an award of attorneys' fees.

The evidence, viewed in a light favorable to the jury's verdict, showed the following. Since 1988 plaintiff

taught history part-time at the college. In 1990 the college announced an opening for a full-time history instructor on the tenure track. Plaintiff applied. So did 26 other people.

A first-stage committee of five faculty members (Miedema, Kingman, Leary, Ling, and Orozco) examined the applications. Miedema was the department chair. The committee decided to interview four of the candidates (plaintiff, Dodge, Imon, and Williams). After the interviews, each committee member ranked the four candidates. Four committee members ranked Williams first and Imon second. The fifth committee member ranked Imon first and Williams second. Three committee members ranked plaintiff third and Dodge last; the other two ranked Dodge third and plaintiff last. The committee advanced Williams and Imon to the second stage of the hiring process.

The second-stage committee comprised four members (Miedema, Kingman, Scott, and Flanagan). Scott was the college president, and Flanagan was acting dean of human resources. This committee interviewed Williams and Imon, then chose Imon for the position. The college board of trustees approved, and Imon was hired.

The application deadline, originally November 14, 1990, had been extended twelve days, because the college felt that by November 14 the pool of applicants contained insufficient representation in terms of gender or ethnicity, and it hoped to attract a more diverse applicant pool. Plaintiff applied before November 14, and Imon applied after November 14.

Dr. Orozco, a member of the first committee, had been on the college faculty since 1972. A historian, he was an expert on the history of Mexico and California. On his interview ratings forms, he commented that Williams, a woman, would be a good role model for the students. (At trial he explained that both men and women college students benefit from having good teachers who are women.) Regarding Imon, he commented, "youthful/fits in w/ our quest to employ younger people/ staff . . . possesses an extra qualification by way of his Japanese-American background and depth of the Japanese language . . . Because of our large Asian enrollment and Mr. Imon's better than acceptable rating, I personally believe he should receive serious consideration for full time employment." (At trial Dr. Orozco explained that he regarded Imon's ancestry as an extra qualification for the position.)

Plaintiff is a man of eastern European ancestry.

By an 11-1 vote, the jurors found that plaintiff's race was a motivating factor in the college's decision not to hire him, but that the college would have decided not to hire him even if race had not been a motivating factor.[1] Under this verdict, plaintiff, who sought only damages, was not entitled to relief.

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[1] When the clerk polled the jurors, the twelfth juror said she was "undecided" whether race was a motivating factor in the college's decision not to hire plaintiff. The court told her to vote, and she then answered "no."

Plaintiff filed a motion requesting an award of legal fees of $48,490 plus other costs of $8,106. The court denied the motion. This appeal followed.

Before the 1991 amendments to Title VII of the federal Civil Rights Act of 1964, federal statutes authorized legal fee awards in employment discrimination cases only to prevailing parties.[2] It has long been established that despite the discretionary wording of a similarly worded civil rights statute (42 U.S.C. § 1988(b)), a plaintiff who prevails under that statute should be awarded reasonable legal fees unless special circumstances make such an award unjust. (*Newman v. Piggie Park Enterprises* (1968) 390 U.S. 400.) Much more recently, it has been decided that the same rule obtains when a plaintiff prevails in employment discrimination litigation. (*Dunning v. Simmons Airlines, Inc.* (7th Cir. 1995) 62 F.3d 863, 872.)

The Civil Rights Act of 1991 (Pub. L. No. 102-166) added several new subsections to section 2000e-5, which deals with employment discrimination. Subsection (g)(2) deals with mixed-motive same-decision cases, that is, cases where discrimination is shown but it did not harm the plaintiff because the employer had other, lawful grounds for its employment decision. In this subsection, paragraph (A) prohibits courts from ordering an employer to hire or rehire a plaintiff, or from awarding

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[2] "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. . . ." (42 U.S.C. § 2000e-5(k).) All statutory references herein are to title 42, United States Code.

back pay, if the employer had a lawful reason for its treatment of him or her. Paragraph (B) reads: "On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court – [¶] (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and [¶] (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)."[3]

In 1989, in a mixed-motive same-decision case, the Supreme Court had ruled that the employee was entitled to no relief at all. (*Price Waterhouse v. Hopkins* (1989) 490 U.S. 228.) The legislative history makes clear that the 1991 Act was intended to overrule the aspect of *Price Waterhouse*, so that if a court found an employer had violated the employment discrimination law, it could issue appropriate injunctive orders to restrain future violations, regardless of whether the proved violation had harmed the plaintiff. (See 1991 U.S. Code Cong. & Admin. News, vol. 2, pp. 583-587, 709-712.)

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[3] The cross-referenced provision, section 2000e-2(m), was also added by the 1991 Act. It provides, in pertinent part, that "an unlawful employment practice is established when the complaining party demonstrates that race . . . was a motivating factor for any employment practice, even though other factors also motivated that practice."

To be considered a prevailing party in civil rights litigation, a plaintiff must obtain "at least some relief on the merits of his claim" or "an enforceable judgment against the defendant" or "comparable relief through a consent decree or settlement," and the relief obtained must "directly benefit him at the time of the judgment or settlement." (*Farrar v. Hobby* (1992) 506 U.S. 103, 111.) It is thus clear that the award authorized by section 2000e-5(g)(2)(B) is not contingent on the plaintiff's prevailing, for the statute (§ 2000e-5(g)(2)(A), (B)(2)) prohibits any grant of relief directly benefiting the plaintiff in a mixed-motive same-decision case. (See *Hall v. City of Brawley* (S.D. Cal. 1995) 887 F. Supp. 1333, 1346 fn. 5 [plaintiff need not be a prevailing party within the meaning of *Farrar v. Hobby* to be eligible for a fee award under § 2000e-5(g)(2)(B)(1)].)

In the present case, plaintiff sought only damages, not declaratory or injunctive relief. Accordingly, once the jury returned its verdict, four things were established: the college had engaged in an unlawful employment practice; plaintiff was not entitled to the relief he had sought; plaintiff was not a prevailing party; and the court had statutory authority to award him legal fees and ordinary costs.

Plaintiff contends (1) the trial court ignored section 2000e-5(g)(2)(B) and denied him legal fees merely because he was not the prevailing party; and (2) the correct legal standard in a mixed-motive same-decision case is that fees should be awarded to the plaintiff unless special circumstances render such an award unjust. Plaintiff asks us to apply the correct standard ourselves, and to

render a decision without remanding the case to the trial court.

Plaintiff's first contention is rejected. It is based on a sound bite isolated from the court's spoken ruling on his motion: "I don't find that Waszak was the prevailing party in this case. Your request for attorneys' fees will be denied." The court's complete remarks, however, show that the court fully considered plaintiff's motion and the authorities he cited. It was appropriate for the court to make an explicit ruling on which party had prevailed, because plaintiff had devoted almost the entirety of his reply memorandum to arguing that he was the prevailing party. In addition, as we will explain below, the Supreme Court of the United States has ruled that in fixing the amount of attorneys' fees in civil rights cases, a paramount consideration is the result achieved by the plaintiff, and a court can fix even a prevailing party's fees at zero in an appropriate case. Therefore we regard the trial court's attention to the outcome of the case as well advised.

We also reject plaintiff's second contention, that in a mixed-motive same-decision case fees should normally be awarded to the plaintiff, in the absence of special circumstances dictating otherwise. The courts developed such a principle under statutes which authorized fee awards to a prevailing party. In contrast, the statute in this case, section 2000e-5(g)(2)(B), authorizes fee awards to a plaintiff who has proved one element of his claim, but has failed to prove a second element – causation – which is essential to a judgment in his favor. For that reason, we hold the presumption favoring awards to

plaintiffs does not operate in a mixed-motive same-decision case.

Instead, we believe, in such a case a trial court should evaluate the plaintiff's fee application under all the pertinent circumstances, and exercise its sound discretion whether to make such an award. This is exactly what the statutory language suggests ("the court . . . may grant . . . attorney's fees and costs").

We know of only two cases factually on point. In *Sheppard v. Riverview Nursing Centre, Inc.* (D. Md. 1994) 870 F. Supp. 1369, a mixed-motive same-decision employment discrimination case, the trial court granted plaintiff's request for an award of $40,000 in legal fees. In a lengthy opinion, the trial court explained that section 2000e-5(g)(2)(B) authorizes such an award, but the court squandered not a drop of ink explaining its decision to do so. Consequently we do not know what interpretation the court gave to the authorizing statute.

In *Snell v. Reno Hilton Resort* (D. Nev. Jun. 17, 1996) ___ F. Supp. ___, a mixed-motive same-decision employment discrimination case in which plaintiff obtained no relief of any kind, the trial court granted plaintiff half of the legal fee she requested, reasoning that a denial of fees would frustrate the Congressional intent in enacting section 2000e-5(g)(2)(B). The court noted, however, that the grant of fees lies within the court's discretion, and so we do not regard the decision in *Snell* to award a fee as a holding that denial would have been an abuse of discretion.

A concurring opinion in *Smith v. F.W. Morse & Co., Inc.* (1st Cir. 1996) 76 F.3d 413, 431, observed that

"[p]revailing mixed-motives plaintiffs, at the very least, are now entitled to declaratory and injunctive relief and attorney's fees," citing *Kerr-Selgas v. American Airlines, Inc.* (1st Cir. 1995) 69 F.3d 1205, 1210. In fact, *Kerr-Selgas* remarked only that such a plaintiff "may be awarded attorney fees, as well as appropriate declaratory and injunctive relief, but neither damages nor reinstatement are available. . . . "

We must, therefore, look to cases not involving section 2000e-5(g)(2)(B) for further guidance. In *Farrar v. Hobby, supra,* 506 U.S. 103, a civil rights case, we find all the guidance we need to decide the present appeal. In *Farrar* the plaintiff, who owned a boarding school, was indicted for murder on the theory that a student's death resulted from plaintiff's neglect of her urgent need for medical care. State officials quickly acted to close the school. Plaintiff sought $17 million damages for the closing of the school. The jury found that the Lieutenant Governor of Texas had acted to close the school without affording plaintiff due process of law, but it also found that plaintiff suffered no damages as a result. The district court entered judgment for the defendant. The court of appeals remanded with directions to award plaintiff nominal damages. The district court then awarded plaintiff one dollar in damages, plus $280,000 in prevailing-party legal fees under section 1988. The court of appeals ruled that plaintiff had not prevailed, and therefore could not recover fees or costs. The Supreme Court affirmed the judgment of the court of appeals, but on a different ground. It determined plaintiff was a prevailing party because he won a money judgment, but ruled he was not entitled to a fee award, because the most critical factor in

determining the reasonableness of a fee award is the degree of success obtained. It concluded, "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all." (506 U.S. at p. 115.)

This principle – that a trial court should evaluate the degree of a plaintiff's success when deciding what is a reasonable fee to require the defendant to pay him – should also apply in section 2000e-5(g)(2)(B) cases. Such a rule does not vitiate the Congressional purpose underlying section 2000e-5(g)(2)(B), for a plaintiff in a mixed-motive same-decision case can obtain significant injunctive relief when the facts warrant it.[4]

In the present case, we conclude that the trial court properly denied legal fees and costs to plaintiff, for under all the circumstances of the case, it was not an abuse of discretion to rule that a reasonable fee was no fee. Numerous factors supported such a conclusion. Plaintiff failed to establish that he was entitled to any of the relief

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[4] A good example is *Hannon v. Chater* (N.D. Cal. 1995) 900 F. Supp. 1276. Plaintiff, who unsuccessfully sought a position as an administrative law judge with the Social Security Administration, claimed gender discrimination, and the government admitted that it had regarded the gender of the successful candidate (a Commissioner of the Los Angeles Superior Court) as a factor in her favor. The jury found that plaintiff would not have been hired anyway. The court fashioned an injunctive remedy awarding plaintiff preferential placement on the candidate list for a future opening. The court ruled plaintiff was a prevailing party, in view of the significant remedy he achieved, and awarded him substantial legal fees.

for which he prayed in his complaint. His evidence of unlawful discrimination was flimsy, consisting only of the college's effort to attract a diverse pool of applicants and the remarks of one first-level committee member who regarded gender and ethnic diversity on a college faculty as desirable. All five committee members rated plaintiff lower than two other candidates for the position, and plaintiff must have known this early in the litigation, if not before he filed suit. None of the jurors found that plaintiff was harmed by discrimination. Plaintiff attained nothing for himself by this litigation, and inflicted on the college the expense of defending a groundless lawsuit. In the process he forced the college president and dean and faculty to explain their hiring decision under oath, an unwarranted indignity certain to harm higher education by deterring faculty from agreeing to serve on hiring committees. Finally, a public college should be praised, not fined, for its modest effort to attract and hire some highly qualified faculty members who are not white or who are not male. As Justice O'Connor phrased it in her concurring opinion in *Farr* [sic] *v. Hobby*, "[O]ne searches these facts in vain for the public purpose this litigation might have served." (506 U.S. at p. 122.)

The judgment is affirmed. Costs to respondents. Appellant's request for an award of attorneys' fees on appeal is denied.

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KLEIN (Brett), J.*

We concur:

KLEIN, P.J.

CROSKEY, J.

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* Judge of the Municipal Court for the Los Angeles Judicial District, assigned by the Chairperson of the Judicial Council.

Second Appellate District, Division Three, No. B088108
S055286

IN THE SUPREME COURT OF CALIFORNIA

LEON J. WASZAK, Appellant

v.

PASADENA CITY COLLEGE, Respondent

(Filed Sep. 18, 1986)

Appellant's petition for review DENIED.

GEORGE
Chief Justice